

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Mahoneys Sports Grill Ltd.
("Mahoneys")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 97/740

Date of Hearing: November 18, 1997

Written Submissions: November 25, 1997
December 2, 1997
December 5, 1997

Date of Decision: January 6, 1998

DECISION

APPEARANCES

Drew Wilson	on behalf of Mahoneys Sports Grill Ltd.
Thomas Lutes	counsel for Mahoneys Sports Grill Ltd.
William S. Robitaille	on his own behalf
Patrick D. Robitaille	counsel for William S. Robitaille
Craig J. Soon	on behalf of William S. Robitaille

OVERVIEW

This is an appeal by Mahoneys Sports Grill Ltd. (“Mahoneys”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated September 18, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Mahoneys alleges that the delegate of the Director erred in the Determination by concluding that William S. Robitaille (“Robitaille”) was not a manager and was entitled overtime wages for overtime hours worked.

PRELIMINARY ISSUES

ISSUE NO. 1

Counsel for Mahoneys requested that an adjournment be granted as he had only been retained the previous day and required an opportunity to review the facts and prepare for the hearing.

Mahoneys filed this appeal on October 8, 1997 and the fact that they chose not to arrange for counsel until the day before the hearing does not persuade me that a compelling reason exists for granting the request for adjournment. However, in light of the fact that information submitted to the Tribunal by Robitaille was not received by Mahoneys until the day prior to the hearing, the hearing was adjourned after receiving evidence from the witnesses in attendance. The purpose for the adjournment was to enable the parties to make submissions in regard to Robitaille’s record of hours worked.

The parties were given strict timelines by the Panel for the receipt of their submissions. All submissions were received in accordance with the timelines set by the Panel.

ISSUE NO. 2

Counsel for Robitaille submits that this appeal by Mahoneys should be dismissed as Mahoneys did not participate during the investigation by the Director and, consistent with the Tribunal's previous decisions in *Tri-West Tractor Ltd.* BC EST No. D268/96 and *Kaiser Stables Ltd.* BC EST No. D058/97, should not now be permitted to appeal the merits of the Determination.

Counsel for Mahoneys submits that the facts in this appeal are distinguishable from both *Tri-West Tractor* and *Kaiser Stables* and those decisions of the Tribunal should not be considered. Counsel further submits that in the case at hand, there is only evidence of an inadvertent single incident of refusal to provide records because of an apparently mislaid letter and the matter in dispute, overtime pay, is not of the same complex nature as the issues of termination of employment.

Counsel for Mahoneys further submits that Mahoneys have "taken their lumps for failure to comply" with the request for records by virtue of the Penalty Determination.

FACTS

Robitaille filed a complaint seeking payment for overtime hours worked. In her submission, the Director informed the Panel that following the complaint being filed with the Employment Standards Branch, she took the following steps:

- November 18, 1996 - a letter was mailed by regular mail to Mahoneys advising them of Robitaille's complaint;
- February 5, 1997 - she attended at Mahoneys place of business and met with Drew Wilson ("Wilson"). She advised Wilson that 3 complaints had been filed and that one of those complaints was from Robitaille. She further advised Wilson that Robitaille was seeking unpaid overtime pay.;
- She received no response from Mahoneys;
- She telephoned Mahoneys on April 10, 1997;
- She subsequently made numerous attempts to contact Mahoneys by telephone, all of which were unsuccessful;
- On April 24, 1997, a Demand For Employer Records was mailed by certified mail to Mahoneys seeking the records with respect to Robitaille. A copy of the demand was also sent to Mr. Tim Bezeredi (Mahoneys' lawyer);
- The signed "Acknowledgment of Receipt" of the copy of the Demand sent to Mahoneys lawyer was received by the Employment Standards Branch on April 30, 1997;
- The signed "Acknowledgment of Receipt" of the Demand sent to Mahoneys was received by the Employment Standards Branch on May 1, 1997;

- No records were provided;
- On June 9, 1997, the Director issued a Penalty Determination against Mahoneys in the amount of \$500.00 for failing to produce records as requested;
- The Penalty Determination was mailed by certified mail to Mahoneys, the Registered & Records Office and to the named director of Mahoneys, Blair Wilson (“B. Wilson”);
- The signed “Acknowledgment of Receipt” of the copy of the Penalty Determination sent to Mahoneys’ Registered & Records Office was received by the Employment Standards Branch on June 12, 1997;
- The signed “Acknowledgment of Receipt” of the copy of the Penalty Determination sent to Mahoneys was received by the Employment Standards Branch on June 16, 1997;
- The signed “Acknowledgment of Receipt” of the copy of the Penalty Determination sent to B. Wilson, director of Mahoneys, was received by the Employment Standards Branch on June 16, 1997;
- Notwithstanding the foregoing, no records were provided by Mahoneys;
- On September 17, 1997, the Director issued this Determination based on the records provided by Robitaille.

Counsel for Mahoneys submits that “by reason of an apparent oversight, management did not receive this request (demand for employer records) and records were not sent to the Employment Standards Branch”.

The Director investigated the records and information provided to her by Robitaille. She was unable to compare Mahoneys records to Robitaille’s records and information. On the basis of the investigation she determined that Mahoneys had not paid Robitaille for the overtime hours worked and that the complaint should succeed.

In their final submission, in regard to the issue of numerous requests for records, counsel for Mahoneys concedes “Mahoneys has confirmed that at least some of these requests and contacts were made.....”.

ISSUE TO BE DECIDED

Mahoneys refused to participate in the Director’s investigation. Is Mahoneys entitled to introduce evidence in appeal that it refused to provide to the Director during the investigation ?

ANALYSIS

The Tribunal found in *BWI Business World Incorporated* BC EST No. D050/96 that the investigation and determination by the Director to be of a quasi-judicial nature. The decision making process was quasi-judicial in the case at hand. Mahoneys was given an opportunity to make a submission to the Director. The Director made numerous attempts to discuss the records and information submitted by Robitaille. Mahoneys ignored the Director's concerted efforts to give them the opportunity to participate. That was their decision.

Mahoneys did not participate not did it cooperate in virtually all aspects of the Director's investigation. It now seeks to challenge the Director's Determination with evidence it acknowledged it did not provide to the Director as requested. The Tribunal will not allow that to occur. In previous decisions of the Tribunal, *Tri-West Tractor Ltd.* BC EST No. D268/96 and *Kaiser Stables Ltd.* BC EST No. D058/97, the Tribunal has stated it will not allow an employer to completely ignore the determination's investigation and then appeal its conclusions. I concur with those previous decisions.

Mahoneys failure to participate is significant. I am not persuaded that the Director should have to make numerous unsuccessful attempts to obtain information from an employer prior to issuing a Determination. The Director is required, pursuant to Section 77 of the *Act*, to "..... make reasonable efforts to give a person under investigation an opportunity to respond." In the case at hand, the efforts expended by the Director to provide an opportunity for Mahoneys to respond were, in my view, more than reasonable and Mahoneys, by their own choice, refused to participate.

The Determination, however, must still explain the basis of its conclusions. I am satisfied that it does that. The Determination sets out the uncontested hours worked by Robitaille during his period of employment with Mahoneys. The Director's finding of overtime hours worked is established in those documents.

For all of the above reasons, the appeal by Mahoneys is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 18, 1997 be confirmed in the amount of \$11,712.61 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal